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NO. 82-963

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

COMMONWEALTH OF MASSACHUSETTS

Petitioner,

vs.

OSBORNE SHEPPARD,

Respondent.

On Writ of Certiorari to the
Supreme Judicial Court of Massachusetts

BRIEF OF AMICI CURIAE STATE OF FLORIDA, ET AL.

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QUESTION PRESENTED

Whether the Fourth Amendment to the United States Constitution requires inflexible application of the Exclusionary Rule when a police officer has reasonably and in good faith relied upon a search warrant to seize items specified in his application for the warrant, but the warrant is subsequently invalidated for judicial error in failing to specify the items in the warrant itself?

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This brief is submitted by the State of Florida and the following states in support of the State of Massachusetts:

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California	Attorney General John K. Van de Kamp
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INTEREST OF AMICI CURIAE

The above-listed states, through their attorneys general, respectfully offer this brief in support of the State of Massachusetts. The amici will all be bound by the decision since this case involves the Fourth Amendment to the United States Constitution, made applicable to the states by Mapp v. Ohio, 367 U.S. 643 (1961). Many of the amici have state constitutions which have been construed in the search and seizure context to be identical to the Fourth Amendment to the United States Constitution. Indeed, Florida's constitutional prohibition against unreasonable searches and seizures expressly states that:

> This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.

Fla. Const. of 1968, Art. I, §12 (1982).

Additionally, three of the amici have legislatively provided a good faith exception to the exclusionary rule. See Utah Code Ann. §§78-16-1 through 11 (Interim Supp. 1982); Ariz. Rev. Stat. Ann. §13-3925; Colo. Rev. Stat. §16-3-308. Obviously, the ruling in this case will affect these amici, as well as those states contemplating similar legislation.

Furthermore, the state attorneys general in assembly have gone on record by formal resolution that they support legislation which would provide that "evidence obtained in the course of a reasonable good faith search should not be excluded from criminal trials." This resolution is included in the Appendix to the brief.

SUMMARY OF THE ARGUMENT

As the exclusionary rule is now rigidly applied, it no longer serves to deter police misconduct or foster the integrity of the judicial system. Instead, imposition of the rule in an overwhelming number of cases benefits those who violate the law, without regard to how exclusion obscures society's goal of obtaining the truth at trial. Amici submit that the Court should modify the rule to make its application more sensitive to the costs and benefits of its imposition.

Because it is impossible to deter police officers from doing acts which they do not know, or could not reasonably know are illegal, evidence should not be excluded when police officers act with both a reasonable and good faith belief that their conduct is lawful.

However, in all cases in which a neutral and detached magistrate has issued a search warrant which commands or authorizes that law enforcement officers conduct a search, evidence should not be excluded because there is no way that the purpose of the rule can be served. The judiciary has actively encouraged law enforcement officers to obtain warrants, and it is not prudent to punish society's effort to obtain justice, thus benefiting only those with something to hide, because a judicial officer has improperly or incorrectly issued a search warrant. Therefore, unless the warrant was obtained by fraud or was improperly executed, evidence should never be excluded once a neutral and detached magistrate has issued a search warrant.

ARGUMENT

THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED WHEN THE EXCLUSION OF EVIDENCE WOULD FAIL TO SERVE THE RULE'S PURPOSE OF DETERRING POLICE OFFICERS FROM MISCONDUCT.

The exclusionary rule is a judicially created procedural safeguard applied to the benefit of criminal defendants. In recent years, some of the current members of the Court, as well as hundreds of other judges throughout the country, have questioned the continued viability of the rule in light of how the rule has been followed without regard to the question of guilt or innocence or more importantly without regard to the original purpose of the rule. Schneckloth v. Bustamonte, 412 U.S. 218, 267, n.24 (1973)(Powell, J., concurring). The time has come when the Court can no longer ignore the encouragement that blind adherence to the exclusionary rule affords the ever expanding criminal component of

our society. The rule should be modified, and the time is now.

A.

THE EXCLUSIONARY RULE SHOULD BE MODIFIED BECAUSE ITS PRESENT SWEEPING APPLICATION, WITHOUT REGARD TO THE EXTENT OR MAGNITUDE OF A FOURTH AMENDMENT VIOLATION, FRUSTRATES THE RULE'S PURPOSE.

It is now well settled that the primary purpose of the exclusionary rule is to deter police conduct which violates the Fourth Amendment. Stone v. Powell, 428 U.S. 465, 486 (1976). However, it is equally well settled from the enormous amount of controversy about the manner in which the rule has been applied that it "not only sets the criminal free but also fails to serve any constitutional interest in securing compliance with the important requirements of the Fourth Amendment." Illinois v. Gates, ___ U.S. ___, 76 L.Ed.2d 527, 554 (1983)(White, J., concurring). Significant questions about the continued vitality of the rule have recognized the

need for reform. Illinois v. Gates, supra, 76 L.Ed.2d 539 [citations omitted].

The amici curiae submit that as the rule is now rigidly applied by state and intermediate federal courts, it serves almost exclusively to punish society's law-abiding citizens while benefiting criminals whom the rule was never intended to serve. Why should criminals go free because "the constable has blundered"? People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (N.Y. 1926)(Cardozo, J.).

It should be beyond peradventure that justice should be a truth seeking process --however, as the rule is now inflexibly applied, it fosters disrespect rather than enhancing the integrity of the judicial system which originally was a second reason for the rule. Stone v. Powell, supra at 428 U.S. 484. Illinois v. Gates, supra, at 76 L.Ed.2d 561 (White, J., concurring).

Thus, the rule is now causing precisely the same disrespect for the judicial process which it sought to eliminate! Cf. United States v. Payner, 447 U.S. 727, 736 (1980); Commonwealth v. Sheppard, 441 N.E.2d 725, 732, n.14 (Mass. 1982).

As the rule is now applied, it makes no distinction among the "significant practical differences" of various fourth amendment violations. Brown v. Illinois, 422 U.S. 590, 609 (1975)(Powell, J., concurring in part). Instead, once it is determined after the fact that the Fourth Amendment has been abridged, evidence is excluded without regard to the culpability of the officer who seized it. How can an officer be deterred from doing something he does not know is wrong? This defies common sense. Illinois v. Gates, supra, 76 L.Ed.2d 562 (White, J., concurring).

Moreover, because police officers are insulated from the actual exclusion decision (e.g., sequestered at the suppression hearing or removed by time and distance from an appellate exclusion of evidence), the purpose of police deterrence is defeated because officers may never learn how or why the evidence was excluded. Instead, law enforcement officers are likely to blame the judiciary, the prosecutor, or "the system," thus obliterating any chance of inspiring confidence in the judicial system, which was the second reason for the rule.

The frailty of the rule as it now exists can perhaps best be evidenced by the fact that no other jurisdiction has adopted it. Ours is the only jurisdiction which tolerates a situation in which if there has been one wrong, the defendant's, the punishment will be swift, but where there

have been two wrongs, the defendant's and an officer's, both will escape punishment. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 755 (1970). Legislation to amend the judicially created exclusionary rule has recently been reported out of the Committee on the Judiciary. During his remarks, Senator Thurmond noted that the present Administration was instrumental in formulating the new legislation.[1]

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[1] Congressional Record, s.1764, 98th Cong., 1st Sess., 129 Cong. Rec. 11679 (Aug. 4, 1983). The Bill amends 18 U.S.C. §223(2)(a) and is entitled "Limitation of the fourth amendment exclusionary rule" and reads as follows:

> Except as specifically provided by statute, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be excluded in a proceeding in a court of the United States if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the Fourth Amendment to the

A final reason that the exclusionary rule no longer serves its original purpose is that it discourages law enforcement officers from relying upon or following up citizen participation in crime prevention and detection. In recent years, literally hundreds of crime-watch programs and other crime reporting methods relying upon citizen initiative have sprung up across the country. A blanket application of the rule, as the Supreme Judicial Court of Massachusetts felt compelled by law to apply in this case, serves absolutely no useful purpose and instead enhances public distrust and disgust with a judicial rule

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Constitution of the United States. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation.

which rewards murderers for technical errors of judgment made by judges and law enforcement officers in the heat of a homicide investigation. Unquestionably, as the rule is inflexibly applied now, in such cases only society and justice, not the criminal, are punished. While the amici might not question rules of law which would permit 100 guilty to go free to prevent an innocent person from being convicted, that is not the situation where the exclusionary rule is involved because the violation does not involve the integrity of the truth finding process. Stone v. Powell, supra. A defendant who is attempting to use the rule is unquestionably seeking to obscure the truth.

B.

THE EXCLUSIONARY RULE HAS A SIGNIFICANT DELETERIOUS EFFECT ON PROSECUTIONS INVOLVING THE FOURTH AMENDMENT.

The State of Florida and the amici strongly disagree with those who argue that there is no problem with the exclusionary rule as currently applied and that evidence is excluded in only a handful of cases.[2] A recent study by the National Institute of Justice reveals that in California 4.8% of cases rejected for prosecution between 1976-1979 were rejected for search and seizure problems. National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California 10 (1982). Of

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[2]Amici recognize that statistics are often not dispositive because they can be viewed in a myriad of ways. See, Gregg v. Georgia, 428 U.S. 153, 186 (1976). However, these statistics are offered in Respondent's case to demonstrate that the controversy surrouding the exclusionary rule is both real and significant.

those 4.8%, 71.5% were drug offenses. Id. at 12. Also, the authors of the report indicated that the data analyzed for the study tended "to understate the net effect of the exclusionary rule." Id. at 9.

The significance of these percentages becomes strikingly apparent when applied to other states. For example, in Florida, in 1980 and 1981, 89,451 out of a total of 274,899 cases filed were dismissed prior to trial.[3] Applying California's conservative 4.8% figure to Florida's dismissals reveals that 4,293 cases might not have been prosecuted during those two years because

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[3]Florida Judicial System Statistical and Program Activity Report, 1980 and 1981, at A-1 and B-1 (1982). Dismissals prior to trial are not categorized by reason for the dismissal, thus exact figures are unavailable for search and seizure problems. Also, no figures are available for cases which were never referred for prosecution because law enforcement officers were aware of search problems.

of search and seizure problems. It is also significant to note that during the same period, 36% of the drug cases which were filed were dismissed prior to trial. Presumably, a large number of dismissals were for search and seizure problems.

Should there be any doubt about the significance of the problem, the Court has only to note that three of the cases which this Court deemed significant enough to grant certiorari during its last term came from Florida and involved the exclusionary rule. See Florida v. Royer, ___ U.S. ___, 75 L.Ed.2d 229 (1983)(drug courier profile); Florida v. Casal, ___ U.S. ___, 77 L.Ed.2d 277 (1983)(warrantless safety inspection of vessel); Florida v. Brady, Case No. 81-1636 (open fields). Regardless of how the figures are viewed, the problem is significant and requires the Court's immediate attention. See Illinois v. Gates, supra, at 76 L.Ed.2d 539.

The severity of the drug problem in the United States, and particularly in Florida, is evidenced by the recent publicity and fiscal and military support given to south Florida by the current Administration. However, all the money in the world cannot solve the drug problem if the cases are never brought to trial because of the exclusionary rule.

Finally, while most of the available data addresses dismissals prior to trial, the Court should not overlook that application of the rule by appellate judges is a major obstacle to the truth seeking process. Suppression ordered by appellate judges is even more egregious because the evidence has already been deemed admissible by a trial court--again, how is the goal of police officer deterrence fostered when even the judges cannot agree on the law? In Florida alone, at least 48 officially

reported cases were reversed on appeal between 1980 and 1982 for search and seizure problems.[4] Of course, no data is available on the number of cases which were not appealed by the State because of the 48 published opinions which established adverse law.

No matter how the above data is categorized and analyzed, one factor is inescapable--the exclusionary rule affects a significant number of cases, and consequently a large number of guilty defendants have escaped prosecution because of it. Law enforcement officers are frustrated and society is outraged by technical, often nonsensical, even apologetic appellate rulings which allow convicted murders like

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[4]This information was obtained from a computer search and does not reflect the number of appeals sought but lost by the State.

Respondent opportunities to escape justice. The exclusionary rule was not designed for such purposes, and the Court should take this opportunity to cause the rule to be applied only in those limited situations in which police officer deterrence will be fostered.

C.

EVIDENCE SHOULD NOT BE EXCLUDED WHEN IT WAS SEIZED BY A POLICE OFFICER WHO HAD A GOOD FAITH BELIEF SUPPORTED BY OBJECTIVE REASONABLE GROUNDS THAT HIS CONDUCT WAS LAWFUL.

While there has been widespread agreement among law enforcement officers, prosecutors, judges, and even some of the defense bar that there are problems with the application and enforcement of the exclusionary rule, the question remains what should be done to the rule itself or the manner in which it is applied. The amici curiae are not urging the Court to take the drastic step of abolishing the exclusionary rule altogether, but rather, the various states are asking the Court to modify the rule in a common sense fashion which would still accomplish the rule's original objectives.

The Court should adopt an approach which eliminates the "all or nothing"

rationale of the rule as it is now being applied. The amici submit that a better alternative would be a rule which would not order exclusion when the evidence was seized by a law enforcement officer acting in good faith with a reasonable belief supported by objective reasonable grounds that his conduct was lawful.

The Court has already adopted this type of approach in many varied situations involving evidence seized or obtained from improper searches and seizures. In Michigan v. DeFillippo, 443 U.S. 31 (1979), the Court upheld the admission of evidence which had been seized after an arrest which was later termed illegal only after the ordinance authorizing the arrest had been found unconstitutional. The Court recognized that "[a] prudent officer, in the course of determining whether respondent had committed an offense under all the

circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional." Id. at 443 U.S. 37, 38. The Court noted that it was a police officer's duty to enforce laws until those laws are found unconstitutional, and the Court commented that society would suffer if police officers took it upon themselves to determine which laws were constitutionally entitled to enforcement. Id. at 443 U.S. 38.

In United States v. Peltier, 422 U.S. 531 (1975), a majority of the Court refused to apply the exclusionary rule to a border search when the statutory and regulatory authority for the search were found unconstitutional in a case that was decided long after the search had been conducted. The Court specifically recognized that exclusion of evidence was not required when

it would not serve the purpose of the rule because there had been absolutely no way for the law enforcement officers to know that their search was unconstitutional. Id. at 422 U.S. at 542.

Similarly, in Michigan v. Tucker, 417 U.S. 433, 447 (1974), a majority of the Court recognized that where police officers had acted "in complete good faith" the rule's deterrence rationale was not compelling enough to cause the exclusion of evidence even though the evidence had been indirectly obtained in violation of the Constitution because the defendant had not been Mirandized.

The Court has previously applied this same rationale in its retroactivity cases. In Linkletter v. Walker, 381 U.S. 618, 637 (1965), the Court refused to make retroactive Mapp v. Ohio, 367 U.S. 643 (1961), which, of course, was the case which held

that the exclusionary rule was applicable to the states in the first place. In Linkletter, the Court explicitly recognized that the application of the exclusionary rule retroactively "by the wholesale release of the guilty victims" [criminals] would not serve the rule's purpose of police officer deterrence. Id. at 381 U.S. 637. In other words, the Court implicitly recognized that police officers would not be deterred by the application of the rule at that late date because when their alleged "illegal conduct" had occurred, that conduct had not yet been judicially declared to be illegal. The rule was not applied retroactively because the reason for the rule would not have been served. See also Desist v. United States, 394 U.S. 244 (1969), in which the Court refused to apply retroactively Katz v. United States, 389 U.S. 347 (1967), which had expanded the

limits of fourth amendment protection in terms of reasonable expectation of privacy.

This logic is unaffected by the Court's more recent case of United States v. Johnson, ___ U.S. ___, 73 L.Ed.2d 202 (1982). That case is consistent with the rationale supporting a good faith exception because in Johnson, law enforcement officers should have been on notice for at least one month that a warrantless arrest in a home was illegal in that jurisdiction. Id. at 73 L.Ed.2d 216, n.15. Thus, a law enforcement officer who made a warrantless arrest could not have had both a good faith and reasonable belief that his conduct was lawful, and consequently, a good faith exception could not be justified under those circumstances. Had that not been the case, this Court might well have reached a contrary conclusion. See United States v. Peltier, supra.

Moreover, the same practice of not applying the harsh sanctions of the rule in situations where the purpose of deterring police officer illegal conduct would not be served can be found in the Court's standing cases. For example, in Rakas v. Illinois, 439 U.S. 128, 134 (1978), the Court refused to apply the exclusionary rule to the benefit of defendants whose fourth amendment rights had not been violated. See also United States v. Payner, 447 U.S. 727, 735 (1980), in which the majority of the Court refused to allow the suppression of otherwise admissible evidence which had been seized unlawfully from a third party not before the Court. The Court emphasized that the interests of deterring illegal searches were not served by the exclusion of the evidence at the "instance of a party who was not the victim of the challenged practices." Id.

In United States v. Ceccolini, 435 U.S. 268 (1978), the Court declined to exclude live testimony which had been derived from an unconstitutional search--the Court stated that exclusion would have no relation to the rule's deterrence rationale. Id. at 435 U.S. 279.

In a similar vein, the Court has not seen fit to apply the exclusionary rule in the context of impeachment of a defendant's testimony at trial. In United States v. Havens, 446 U.S. 620, 628 (1980), the Court held that the rule's interest in police deterrence was outweighed by society's interest in reaching the truth at trial, and the Court allowed the prosecution to impeach the defendant's testimony with illegally obtained evidence which was inadmissible in the government's direct case. See also Oregon v. Haas, 420 U.S. 714 (1975); Harris v. New York, 401 U.S.

222 (1971); and Walder v. United States, 347 U.S. 62 (1954).

Also, the exclusionary rule has not been applied in federal civil proceedings even though the evidence was seized in violation of the Constitution. In United States v. Janis, 428 U.S. 433, 455 (1976), Justice Blackmun wrote that there was no justification for extending the exclusionary rule to a federal civil proceeding based upon evidence unlawfully seized by a law enforcement officer who had acted in good faith:

> In short, we conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule. (Footnote omitted.)

In accord, United States v. Caceres, 440 U.S. 741 (1979)(evidence obtained in violation of Internal Revenue Service regulations admissible in criminal trial when agency action reflected a good faith attempt to comply with the law).

Similarly, the rule has not been applied to grand jury proceedings. United States v. Calandra, 414 U.S. 338 (1974). The Court noted that any possible "minimal advance in the deterrence of police misconduct" was outweighed by society's interest in not hampering the role of the grand jury. Id. at 414 U.S. 351, 352.

Thus, it is clear that the Court has already recognized the problems with the rule and the wisdom of not applying the rule in situations in which alleged police misconduct would not be deterred or the truth finding process would be impeded. However, the Court has not yet taken that

last step and ruled that evidence should not be suppressed when it was seized by a police officer who was acting in a reasonable good faith belief, supported by articulable objective grounds, that the search and seizure was lawful. This case presents such an opportunity.

The Fifth Circuit Court of Appeals, sitting en banc, has already adopted the same good faith standard which the amici curiae submit should be made law nationwide. United States v. Williams, 622 F.2d 839, 847 (5th Cir. 1980), cert. denied, 449 U.S. 1127 (1981). The good faith exception to the exclusionary rule is also the law in the Eleventh Circuit. Bonner v. Prichard, 551 F.2d 1206 (11th Cir. 1981)(en banc).

In Williams, the Fifth Circuit emphasized that it had modified the rule "only to conform that [the rule] to its underlying purpose: to deter unreasonable

or bad-faith police conduct." Id. at 622 F.2d 847. The court also explained that the good faith exception would apply only if the officer's belief was both "bona fide and reasonable." Id. at 622 F.2d 843 (emphasis added). This principle was recently reaffirmed in United States v. Mahoney, ___ F.2d ___, Case No. 82-1452 (5th Cir., opinion filed Aug. 22, 1983). Therefore, suppression would still result in cases in which the proponent of the evidence could not establish that the officer's belief was both in good faith and reasonable in light of the circumstances known to the officer at the time. In other words, the original purpose of the rule would still be served by exclusion of evidence in cases involving bad faith or unreasonable conduct on the part of law enforcement officers.

The adoption of the good faith exception to the exclusionary rule by this Court would not be a decision which would strip defendants of their constitutional rights. While protection against unreasonable searches and seizures may have its roots in the common law and, of course, the Constitution, the exclusion of evidence thus obtained is uniquely a product of the judicial system of the United States. Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, supra.

Moreover, practice in both the Fifth and Eleventh Circuits has conclusively demonstrated that the anguished outcries found in the rhetoric of those opposed to modifying the rule are unfounded. In fact, on March 16, 1982, the Senate Judiciary Subcommittee on Criminal Law heard testimony on whether Congress should statutorily create a good faith exception

to the exclusionary rule. Testimony before that Subcommittee established that there had been no abuses of the good faith exception to the exclusionary rule in either the Fifth or Eleventh Circuits as of that date.[5]

As Chief Justice Burger explained in his dissent in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 419, 422 (1971), a civil remedy against the offending officer would be more viable than the "universal 'capital punishment'" inflicted upon all illegally obtained evidence, regardless of how it was obtained. Amici submit that police officer deterrence would be more

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[5]The Committee heard testimony that there had been 1,185 criminal filings in the Southern District of Texas, 119 criminal filings in the Southern District of Alabama, and 602 criminal filings in the Southern District of Florida. There was absolutely no empirical evidence or other allegation that the good faith exception had been abused.

likely to occur if offending officers (or their supervisors) were made civilly liable. In egregious cases, law enforcement officers would be much more likely to police their own since they would no longer be insulated from their conduct. See, e.g., Smith v. Hoath, 691 F.2d 220 (6th Cir. 1982), in which a supervisor was held liable under 42 U.S.C. §1983 for damages resulting from fourth amendment violations. Also, at least one state has already statutorily authorized civil actions against law enforcement officers in lieu of exclusion of evidence resulting from fourth amendment violations. See Utah Code Ann. §78-16-3 (Interim Supp. 1982).

Therefore, the predictions of doom forecast by those opposed to modifying the rule have been proven to be unfounded both in common sense and in fact. There simply has yet to be any claim sustained by

empirical evidence of the irreparable injury of any innocent citizen or group based upon a good faith exception to the exclusionary rule.

The Fifth Circuit has not been alone in establishing a good faith exception to the exclusionary rule. The Louisiana Supreme Court has followed Williams and adopted the good faith exception in upholding a search warrant based upon an affidavit from which material facts had been inadvertently but in good faith omitted. State v. Lehnen, 403 So.2d 683, 686 (La. 1981). See also Gifford v. State, 630 S.W.2d 387, 391 (Tex. Crim. App. 1982), in which it was held that the exclusionary rule would not be applied when the "police misconduct was merely technical." The Supreme Court of Virginia has also indicated that it was persuaded by the reasoning of Williams. Holloman v. Commonwealth, 275 S.E.2d 620, 622 (Va.

1981). See also Drumheller v. Commonwealth, 291 S.E.2d 602, 605 (Va. 1982) (Poff, J., concurring). The Supreme Court of Vermont applied the same rationale this court used in Michigan v. DeFillippo, supra, when it refused to order suppression of evidence seized after a search based on an allegedly unconstitutional statute. State v. Harbaugh, 326 A.2d 821 (Vt. 1974). Moreover other federal courts of appeals have adopted the rationale of Williams. See Robberson Steel Co. v. Occupational Safety and Health Review Comm., 645 F.2d 22 (10th Cir. 1980)(warrantless civil OSHA enforcement proceedings); Donovan v. Federal Clearing Die Casting Co., 695 F.2d 1020, 1024 (7th Cir. 1982)(exclusionary rule not to be applied in civil OSHA enforcement proceedings when warrant has been issued).

At least three state legislatures have already adopted some type of statutory exception to the exclusionary rule. See Utah Code Ann. §§78-16-1 and 8 ("whether the conduct of the peace officer was in good faith"); Ariz. Rev. Stat. Ann. §13-3925 ("evidence was seized by a peace officer as a result of a good faith mistake or technical violation"); Colo. Rev. Stat. §16-3-308 ("evidence was seized by a police officer...as a result of a good faith mistake or of a technical violation"). Also, the people of California, by initiative, have recently amended their constitution to prohibit exclusion of "relevant evidence." Cal. Const. Art. I, §28(d).

The reasons for modifying the exclusionary rule to allow for the admission of evidence when seized in a reasonable and good faith belief that the seizure was

lawful are compelling. The original purpose of the rule would still be effectuated since under the rationale of Williams the evidence would still be excluded if the officer's belief was not both reasonable and in good faith. The adoption of such an exception would restore integrity to the judicial system while also serving justice by reinforcing the search for truth.

Such an exception is especially appropriate under the facts of this case. The Supreme Judicial Court of Massachusetts recognized that the technical error of the magistrate, not the police, was what required suppression of highly probative evidence. Commonwealth v. Sheppard, supra, 441 N.E.2d 733. The officers acted with a reasonable good faith belief that their conduct fully complied with the law, and that is all that should be required.

Michigan v. DeFillippo, supra. Suppression of evidence in this case can in no way enhance future deterrence of police officers, and that is why the rule should be modified.

If nothing else is certain about fourth amendment law, once an improper search has occurred, the exclusionary rule benefits only those who deserve it least, while doing nothing to aid those innocent persons who have been the subjects of a fruitless search. While the Court has no vehicle to help the latter, the amici strongly urge the Court not to continue judicially sanctioning unjustified windfalls for criminal defendants who unquestionably have something to hide. See Illinois v. Gates, supra, 76 L.Ed. 561 (White, J., concurring).

D.

EVIDENCE SHOULD NOT BE EXCLUDED WHEN A SEARCH WARRANT HAS BEEN ISSUED BY A NEUTRAL AND DETACHED MAGISTRATE.

Regardless of whether the Court accepts the assertion found in the previous section of this brief that evidence should never be excluded in any "good faith" search and seizure, the amici emphatically submit that exclusion is inappropriate in cases involving duly issued warrants, absent a clear showing of fraud by the affiant or the unreasonable execution of the warrant.[6]

In Johnson v. United States, 333 U.S. 10, 13-14 (1948), the Court held that evidence seized pursuant to a warrantless

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[6]Of course, evidence could still be excluded if the police lie or deliberately mislead the magistrate or if the warrant is improperly executed--exclusion under those circumstances would still be consistent with the purpose of the rule. Franks v. Delaware, 438 U.S. 154 (1978). Mapp v. Ohio, supra; Illinois v. Gates, supra, 76 L.Ed.2d 565 (White, J., concurring).

arrest should have been suppressed because the police officers had enough time and information to obtain a warrant. The arrest had been made after law enforcement officers smelled burning opium in the hallway of a hotel and obtained permission from the occupant of the room from which the smell emanated to enter the room. The Court emphasized that:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. Cf. United States v. Lefkowitz, 285 U.S. 452, 464 (1932). See also Coolidge v. New Hampshire, 403 U.S. 443 (1971), in which the Court emphasized the importance of seeking from a neutral and detached

magistrate the approval to search. In that case, the search warrant had been issued by an attorney general who was also directing law enforcement efforts to find the perpetrator of a murder. Several years after Coolidge was decided, the Court again emphasized the importance of the role of a neutral and detached magistrate in the balance between society's right to thwart crime and a citizen's fourth amendment right against unreasonable searches and seizures. Gerstein v. Pugh, 420 U.S. 103 (1975).

Therefore, there is absolutely no way that the purpose of the exclusionary rule, i.e., to deter police misconduct, could ever apply in a search warrant situation (absent perjury or deceit by the officer seeking the warrant). See Brown v. Illinois, supra at 422 U.S. 612, Powell, J., concurring in part. Illinois v. Gates,

76 L.Ed.2d 564 (White, J., concurring). This Court, as well as all other aspects of the judicial system, has actively encouraged officers to seek warrants. Illinois v. Gates, supra, 76 L.Ed.2d 547. In United States v. Ventresca, 380 U.S. 102, 106 (1965), Justice Goldberg explained that in previous cases:

> [T]his Court, strongly supporting the preference to be accorded searches under a warrant, indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall. In Johnson v United States, 333 U.S. 10, and Chapman v United States, 365 US 610, the Court, in condemning searches by officers who invaded premises without a warrant, plainly intimated that had the proper course of obtaining a warrant from a magistrate on the same evidence available to the police made a finding of probable cause, the search under the warrant would have been sustained.

Does it make sense then for the judiciary to exclude evidence under the guise of an unreasonable search and seizure when the police officer has obtained prior

judicial approval for the search? Does it make sense for the judiciary to exclude evidence after a judicial officer has issued a warrant which commands that a search and seizure be made? The amici submit that it obviously does not make sense, yet, as the rule is now applied, that is precisely what occurs daily all over the country. The repeated failure of both state and intermediate federal courts to give deference to a magistrate's probable cause determination as required by Ventresca runs counter to this Court's fourth amendment jurisprudence by encouraging officers not to seek warrants. Illinois v. Gates, supra, at 76 L.Ed.2d 564 (White, J., concurring).

Moreover, as Justice White noted in his dissent in Payton v. New York, 445 U.S. 573, 619 (1980), law enforcement officers today are routinely called upon to make

immediate on-the-spot "subtle discriminations that perplex even judges in their chambers." How then can it be considered prudent to expect law enforcement officers to be deterred when evidence is excluded despite the fact that a neutral and detached magistrate authorized, and, in fact, commanded a search? See Illinois v. Gates, supra, 76 L.Ed.2d 564 (White, J., concurring).

In fact, in Illinois alone, how many otherwise guilty defendants were not brought to trial between April 1, 1980, when the lower appellate court first decided the Gates case and June 8, 1983, when this Court resolved the issue? Amici submit that during this 38 month period, neither magistrates nor police officers could be aware of the correct status of the law, yet the facts supporting the original probable cause determination never changed.

During oral argument in Illinois v. Gates, the Court questioned whether Nathanson v. United States, 290 U.S. 41 (1933), would have to be overruled if the argument now being advanced by the amici were adopted (transcript of reargument at 19, 26). The amici submit that neither Nathanson nor any other warrant case[7] would have to be overruled since the judicial leap from exclusion of evidence in non-warrant cases to all fourth amendment cases was made without "an explanation" of why the rule was applicable--the Court has apparently never addressed the issue. See United States v. Ross, 456 U.S. 798, 824 (1982); Illinois v. Gates, supra, 76 L.Ed.2d 564 (White, J., concurring).

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[7]See, e.g., Giordenello v. United States, 357 U.S. 480 (1958); Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

Nathanson and the other cases would and should still be good law concerning what a magistrate would need before probable cause could be found. All of these cases, coupled with the Court's most recent holding in Illinois v. Gates, should put to rest the hackneyed probable cause litigation and relitigation in cases like Respondent Sheppard's.

However, in response to the anguished outcries of those opposed to modifying the rule, who bleat that fourth amendment law will be forever frozen if the amici's argument is adopted, amici would point out that the Court will still have a more than ample supply of fourth amendment cases resulting from non-warrant cases which will require objective hearings to determine good faith and reasonableness. Appellate review of a trial court's probable cause determination or conclusion that a good

faith analysis is appropriate would prevent fourth amendment jurisprudence from becoming stagnant. Also, novel fourth amendment issues could still be decided in certain cases before good faith is examined. Illinois v. Gates, supra, at 76 L.Ed.2d 565 (White, J., concurring). The only difference would be that evidence would not be excluded when the purpose of the rule cannot be served. See United States v. Mahoney, supra, slip opinion at 6705, n.5.

Another concern which surfaced during the reargument in Gates was what, if anything, should be done about "improper" probable cause determinations of magistrates (transcript of reargument at 28). However, this concern overlooks that the Court has said "time and again" that the Constitution "does not 'assure uniformity of judicial decisions . . . [or] immunity

from judicial error . . . .'" Beck v. Washington, 369 U.S. 541, 554-55 (1962) quoting from Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U.S. 100, 106 (1920).

It also completely overlooks the Court's recent rationale behind applying the rule only when its deterrent purpose can be achieved. It simply makes no sense to exclude evidence allegedly to deter improper police conduct when it is the judge who has made, at worst, what can be termed an error of judgment. Can it seriously be argued that a defendant from whom incriminating evidence was obtained pursuant to an improperly issued warrant deserves the remedy of exclusion when an innocent person is afforded no remedy by the rule when he has been the object of a search conducted as a result of a warrant which should never have issued because of judicial error? They suffer the same legal

defect -- why should only the guilty be rewarded?

Moreover, there is no certainty that de novo review of the facts would reach the "correct" result. Jackson v. Virginia, 443 U.S. 307, 337, n.12 (1979)(Stephens., J., dissenting). If that were the case, then all defendants should be permitted unlimited de novo review until a judge is found who will suppress the evidence. Of course, such a procedure is neither constitutionally required nor feasible. Just as the "substantial societal costs of application of the rule" Stone v. Powell, supra at 928 U.S. 494, are outweighed by the reasons for not allowing relitigation of fourth amendment issues in federal habeas corpus cases, a neutral and detached magistrate's determination of probable cause should not be reweighed by a new judge or court. Cf., United States v. Frady, 456 U.S. 152

(1982), and Engle v. Isaac, 456 U.S. 107 (1982).

The application of the rule is especially harsh in Respondent's case because the police officers relied upon a search warrant issued by a neutral and detached magistrate. In fact, the judge who issued the warrant recognized that the appropriate form was unavailable due to the exigencies of the situation, and he assured the detective who served the warrant that he would "make the necessary changes so as to provide a suitable form of search warrant and that the warrant as delivered was sufficient authority in form and content to carry out the search as requested." Commonwealth v. Sheppard, supra, at 441 N.E.2d 730. However, the evidence was suppressed by the Supreme Judicial Court of Massachusetts because the judge "blundered" by failing to "strike out

certain words in the warrant and [by failing]...to refer to, or to attach to it, a list of the items to be seized." Id., at 441 N.E.2d 733. Highly probative evidence was excluded even though the court recognized that the "defect in the warrant was not harmful to the defendant in the circumstances of the actual search" and that the search would not have occurred any differently had "the warrant not been defective." Id. The Massachusetts court recognized that "[t]he exclusionary rule may not be well tailored to deterring judicial misconduct" (which was actually judicial oversight or error rather than misconduct) yet it applied the rule anyway, ostensibly because it felt obliged to because of this Court's opinions. Id., at 441 N.E.2d 735, 736. If the state court was correct, (but see, State v. Lehnen, supra, and the other similar cases already

cited), the amici urge this Court to change the law now before the integrity of the judicial system is further eroded by the all or nothing approach which is prevalent today.

Law enforcement officers are not supposed to second-guess judges who have commanded or authorized them to search a person or place. There is simply no reason to apply the rule in a search warrant case because the reason for the rule, i.e., police deterrence, cannot possibly exist in a case in which a warrant has been properly issued.[8] At least one commentator has

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[8]Of course, no compelling reason exists to expand the purpose of the rule to include "deterring" neutral and detached magistrates. Absent a showing of misconduct or collusion, magistrates are presumed to be able to follow the law. The problems that arise when a magistrate's determination of probable cause is subsequently rejected usually occur from ambiguity in the law

recognized this. J. Fennelly, Warrant Searches and the Exclusionary Rule, A Rule in Search of a Reason (The Prosecutor, Journal of the National District Attorney's Assoc., Vol. 17, No. 2, Winter 1983, p. 32).

Moreover, the Court has already established in Michigan v. DeFillippo, supra, that police officers could rely in good faith on legislative enactments subsequently judicially determined to be constitutionally infirm without the sanction of the exclusion of evidence. The argument is much more compelling that a police officer may in good faith rely upon

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caused by appellate judges far removed from the exigencies of the criminal investigation. Again, how can the exclusionary rule deter magistrates when appellate judges cannot agree on the law? See, e.g., Robbins v. California, supra; compare, Illinois v. Gates, supra, 76 L.Ed.2d 565, n.17 (White, J., concurring).

a judicial determination[9] that probable cause exists and that a warrant may lawfully issue commanding execution of the warrant. United States v. Williams, supra, at 622 F.2d 841. If not, upon whom can he rely? And if not, why has this Court commanded that police seek prior approval by the judiciary to legitimize the warrant? Coolidge, supra. Moreover,

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[9]Respondent and his supporting amici are expected to urge that the argument advanced in this section necessarily breaks down when it is considered that not all magistrates are legally trained. However, is that as severe as the situation already approved by the Court in Gerstein v. Pugh, supra, in which it was recognized that a person could be deprived of his liberty (without judicial review) because of an indictment issued by lay grand jurors? Assuming arguendo that someone cloaked with the title of lawyer or judge is better able to determine probable cause than a lay person, it would be a simple matter for the Court to allow probable cause to be litigated de novo only when the warrant was issued by a non-lawyer. But see, Shadwick v. City of Tampa, 407 U.S. 345, 352 (1972); Illinois v. Gates, supra, 76 L.Ed.2d 546.

police officers cannot take "it upon themselves to determine...[whether the warrant] was constitutionally entitled to enforcement...." Michigan v. DeFillippo at 443 U.S. 38. If they could, why require them to go to a magistrate in the first place? The Fourth Amendment protects against unreasonable searches and seizures. This Court has already recognized in United States v. Ross, 456 U.S. 798, 823, n.32 (1982), that a search conducted pursuant to a warrant is per se reasonable. See also, Illinois v. Gates, supra, 76 L.Ed.2d 564 (White, J., concurring). Amici submit that the reasoning in Michigan v. DeFillippo "leads inexorably" to the modification of the exclusionary rule as urged by the signatories to this brief. Id. at 76 L.Ed.2d 560, n.12.

As Justice White has recognized, fourth amendment jurisprudence has evolved from

initial bright line rules which have disappeared "in a sea of ever-finer distinctions." Id., at 76 L.Ed.2d 566. Respondent's case is but just an example of how absurd the law has become. See also the majority opinion in Illinois v. Gates at 76 L.Ed.2d 545, n.9, where Justice Rehnquist identified some of the lower courts which had applied the guidelines of Aquilar and Spinelli in a "rigid" manner resulting in inflexible bright lines.

The judiciary and law enforcement branches are distinct parts of the criminal justice system. The judiciary has regularly emphasized the importance of obtaining its approval before law enforcement officers are allowed to invade someone's privacy. Coolidge v. New Hampshire, supra; Johnson v. United States, supra; United States v. Ventresca, supra. Thus, by rigid application of the rule, the

judiciary punishes both society and law enforcement while the guilty go free. This is the antithesis of common sense.

The time has come to give law enforcement officers lawful "breathing room" to operate in the harsh environment of the real world. It is also the time to restore integrity to the criminal judicial system by not applying the exclusionary rule to cases involving search warrants. See United States v. Hill, 500 F.2d 315, 322 (5th Cir. 1974), cert. denied, 420 U.S. 931 (1975). At the very minimum, society and the search for truth should not be punished because "the judge has blundered."

CONCLUSION

There is no doubt that the exclusionary rule has failed to withstand the test of time. As the rule is currently being applied across the country, it fails to deter police officers who are acting with a good faith belief that their conduct is lawful, and it also fosters disrespect for the judicial system by punishing society rather than the guilty defendant.

The rule should be modified to allow the admission of evidence in cases in which police officers acted with a reasonable, good faith belief that their conduct was lawful. However, evidence should never be excluded in cases in which a warrant has been properly secured and executed by the police after having been properly issued by a neutral and detached magistrate. Amici respectfully request the Court to seize this opportunity to correct the injustice

that a blind administration of the exclusionary rule has inflicted upon society.

Respectfully submitted,

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APPENDIX

1981 MID-TERM MEETING

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

ROYAL SONESTA HOTEL
NEW ORLEANS, LOUISIANA
DECEMBER 1-4, 1981

RESOLUTIONS

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III. Exclusionary Rule
(Adopted -- Maryland, Massachusetts and Oregon dissenting)

. . . .

III.

RESOLUTION

EXCLUSIONARY RULE

WHEREAS, the fundamental and legitimate purpose of the exclusionary rule, to deter illegal police conduct and promote respect for the rule of law by preventing illegally obtained evidence from being used in a criminal trial has been eroded by action of the courts barring introduction of evidence of the truth, however important, if there is any investigative error, however unintended or trivial; and

WHEREAS, any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation; and

WHEREAS, evidence should not be excluded from a criminal proceeding if it has been obtained by a law enforcement officer acting in a reasonable, good faith belief that the evidence was obtained in conformity with the Fourth Amendment to the Constitution; and

WHEREAS, a showing that evidence was obtained pursuant to and within the scope of a warrant should constitute prima facie evidence of such a good faith belief; and

NOW, THEREFORE, BE IT RESOLVED that the National Association of Attorneys General supports legislation that would provide that evidence obtained in the course of a reasonable, good faith search should not be excluded from criminal trials; and

BE IT FURTHER RESOLVED that the Association authorizes its General Counsel to transmit these views to the Congress, the Administration, and other interested individuals.